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No. A-105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HON. GEORGE A. ADOLF, Judge
of the Circuit Court of the City of St. Louis,
Petitioner,

vs.

STATE EX REL. WICHITA FALLS GENERAL HOSPITAL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL STATEMENT OF THE CASE

In general, petitioner set forth the general nature of the case. However, some of the references in petitioner's statement of the case tend to be misleading and argumentative and to that extent will be corrected herein.

Basically, Dr. Bolman made a single telephone call to Wichita Falls before flying to Wichita Falls to harvest the organ, not as stated on page 12 of the petition that "Wichita had multiple contacts with the transplant team when the team was still in Missouri * * *". (See Bolman affidavit - A-18, application for certiorari). Further, as the Missouri Court of Appeals opinion correctly points out "While not of particular importance we note that the negligence alleged [against Wichita] occurred prior to any knowledge of Missouri involvement in the transplant. [A-11].

Unfortunately, petitioner did not see fit to incorporate the affidavits filed by Wichita which clearly show that Wichita performed a "not for profit" activity in that the amounts which Wichita received under the agreement between the Southwest Organ Bank and Wichita Falls General Hospital were less than the actual costs incurred by Wichita Falls General Hospital. Wichita incurred a financial loss in connection with offering the organ for transplant to the organ bank. See the attached affidavits of Lloyd L. Cannedy (p. A-1) and Clay Ellis (p. A-4), the Cannedy affidavit being filed in the Circuit Court of the City of St. Louis and the Ellis affidavit being filed in the Missouri Court of Appeals, Eastern District, after the other parties to the appeal filed affidavits on appeal.

On page 7 and 8 of the petition, there appear a number of sentences starting with the phrase "Wichita did not dispute". Many of the phrases are inaccurate and misleading as follows:

(1) "Wichita did not dispute that it knew that it was participating in an interstate information network designed to culminate in the transplantation of a heart in St. Louis, Missouri." This statement is entirely unsupported by any record entry and is in fact erroneous. All that Wichita knew was that it did participate in an interstate information network designed to make available organs for transplantation in any patient anywhere in the United States, and perhaps in any territory of the United States, or perhaps even in any country in the world. Wichita did not know, before the call from St. Louis, that the organ was "designed to culminate in the transplantation of a heart in St. Louis, Missouri" as the statement of facts suggests.

(2) "Wichita did not dispute that it undertook to test the blood type of the donor heart in its facility knowing that this was a crucial factor in the decision to safely transplant the heart into Mr. Ottinger." This also is an incorrect statement and is not borne out in any of the affidavits. As

a matter of fact, it was and is common practice for the operating surgeon to conduct his own blood study and not rely on previously transmitted information. The reason why Dr. Bolman even learned of the fact that there was an incorrect blood type was that another surgeon using another body part from the same donor conducted his own blood test and discovered the mistaken labeling and then called the blood bank which in turn called Dr. Bolman. In fact, the other surgeon precisely followed the ordinary routine which is to conduct his own testing.

(3) "Wichita did not dispute that it reported the blood type of the donor heart to plaintiff's St. Louis doctor and knew that he would rely upon the information." Again, there is nothing in the record to suggest any such inference and in fact, the assertion is inaccurate for reasons set forth above.

(4) "Wichita did not dispute that this directly led to the implantation of an incompatible heart in decedent Robert Ottinger, whose death therefrom is the gravamen of this lawsuit."

In fact, all that Wichita knew was a surgeon from St. Louis was coming down to harvest the heart and use it in a patient in Missouri but this was long after the alleged negligence took place and Wichita did not know that Dr. Bolman would not conduct his own tests, at least, there is no evidence in the record suggesting such knowledge.

A fair assessment of the factual situation is that there was an incorrect blood typing by an employee of Wichita, thereafter when the donor patient was near death, and after the necessary permissions had been obtained, Wichita, in good faith, and for humanitarian reasons only, contacted a regional organ bank and made known the availability of the heart, and other organs, but inaccurately stated the blood type.

Thereafter, Dr. Bolman called, verified that the heart could be "harvested", and Bolman then went to the Wichita facilities

and harvested the heart taking it back with him to St. Louis for implantation in Ottinger.

At no time before Dr. Bolman called Wichita Hospital did anyone from Wichita Hospital have any reason to believe that the heart would wind up in St. Louis, Missouri, as opposed to any of the other states or territories of the United States.

SUMMARY OF ARGUMENT

The Missouri Court of Appeals correctly decided the constitutional issues involved in that a Missouri court specifically relied upon teachings of this Court as expressed in a series of cases beginning with *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S. Ct. 154 (1945) and culminating in the recent case of *Asahi Metal Industry Co. v. Superior Court of California,* ____ U.S. ____, 107 S. Ct. 1026 (1987). The Missouri court expressly held, and correctly, that on the basis of the record before the Missouri court, that Wichita did not take any actions purposely directed toward the State of Missouri. There was no history of contacts by Wichita with Missouri, there was no utilization of the benefits of the laws of the State of Missouri by Wichita, and the State of Missouri was not selected by Wichita, rather, Wichita was selected by the State of Missouri in that Dr. Bolman called Wichita and went to Texas to harvest the heart.

Finally, as the Missouri court pointed out, subjecting Wichita to suit in any state or territory where the heart may have would up, or any organ for that matter, would chill, considerably, the good faith humanitarian efforts of many of the smaller hospitals around the United States. If, for instance, any small hospital in any outlying areas knew, that it could be subjected to liability in a foreign state, thousands of miles away, simply because it made known the fact that a heart or other organ was available for transplantation, surely the availability of such organs would diminish greatly.

ARGUMENT

We submit, respectfully, that petitioner has stretched the facts to the breaking point to create some kind of inference that Wichita really selected Missouri and did business in Missouri so as to impose jurisdiction over Wichita in a Missouri court. In fact, the entire record is otherwise. All that Wichita did was to inform a regional organ bank in Texas of the availability of a donor with a specific blood type which turned out to be inaccurate. That is the only action that Wichita took and it was not directed toward the State of Missouri because at that moment the organ could have gone to any state or territory in the United States, if not country in the world. From that point on, the Missouri physician made the telephone call, went to Texas, harvested the organ, and then, without testing the blood type for himself, implanted the heart in the plaintiff.

Meanwhile, another surgeon, at a different locality, with a different organ, did conduct his own testing, and discovered that there was an error in the blood typing and immediately notified the organ bank which in turn notified Dr. Bolman who had not conducted his own testing.

Interestingly enough, petitioner fails to cite a single precedent from this court which petitioner claims is even remotely analogous to the present case and which supports petitioner's position. This is a very simple omission, but a very telling one because there is no authority from this court which in any way supports petitioner's position in this case.

For instance, as the Missouri court points out, there is one case decided by the Missouri Supreme Court, and ultimately by the United States Supreme Court, which would appear to be dispositive of the issues in this case. We refer to the case of *Sperandio v. Clymer,* 568 S.W.2d 935 (Mo. banc 1978) (Sperandio I) and 581 S.W.2d 377 (Mo. banc 1979) (Sperandio II). In *Sperandio,* suit was filed against a doctor in Utah who upon re-

quest rendered gratuitous advice to a Missouri physician concerning a prospective operation in Missouri on a Missouri resident.

In *Sperandio I,* the court upheld Long Arm jurisdiction and in so doing found two "contacts" sufficient to satisfy due process. The contacts were (1) Missouri's interest in securing redress for its citizens who were injured in Missouri and had no contact with Utah and (2) that the Utah doctor's acts were performed for the purpose of causing an effect in Missouri. This is precisely the same two claims made by petitioner in this case and found wanting by the Missouri court.

Upon certiorari to the United States Supreme Court, 439 U.S. 812, 99 S. Ct. 69 (1978), the judgment in *Sperandio I* was vacated and the cause was remanded "for further consideration in the light of" *Kulko v. Superior Court of California,* 436 U.S. 84, 98 S. Ct. 1690 (1978). In *Kulko,* this court rejected a state court conclusion that where a non-resident defendant had caused an effect in the state by an act or omission outside the state, that personal jurisdiction over the defendant arising from that effect may be exercised wherever "reasonable". This court held that the minimum contacts rule required that the defendant purposely availed himself of the benefits and protection of the forum's laws.

After the remand, the Missouri Supreme Court in *Sperandio II* found an absence of sufficient minimum contacts to meet due process requirements. The Missouri Supreme Court expressly rejected the "causing an effect" in Missouri argument as a minimum contact which is precisely the claim asserted here by petitioner.

In short, the Missouri Court of Appeals in its opinion expressly and carefully went over the precedents of this Court and found that Wichita did not purposefully avail itself of the laws and protections of the State of Missouri. Further, the court found that there was no other contact with the state other than

the claimed "effect" taking place in Missouri which was specifically found to be insufficient in *Kulko*, cited supra.

In light of the precedents of this Court, it would be hard to imagine a more farfetched claim of jurisdiction than that presented here by petitioner. There simply was no contact with the State of Missouri at the time of the alleged negligence, and whatever contact there was with the State of Missouri, was after the claimed negligence, and was initiated by a Missouri physician, after having been apprised of the availability of a heart in Texas by a regional organ bank in Texas.

If Wichita had harvested the heart itself, and then transported the heart to Missouri, for commercial gain, a far different question would be presented. But that is precisely what did not happen. All of the sentences starting with "Wichita does not dispute that" do not change the plain facts of the matter.

The Missouri court accurately, and succinctly, pointed out in its opinion some very fundamental policy reasons why jurisdiction should not be imposed on Wichita under the facts of this case. The court's reasoning was expressed as follows:

> "As this case makes clear the demand for donor organs exceeds the supply. Missouri is an important organ transplant center and must seek its supply of those organs from throughout the country and possibly the world. Transplant surgery is still in its early years. By its nature it is high risk surgery and presumably the treatment of last resort in most cases. Because of its high risk and the possibility of lethal results if unsuccessful it has great potential as a source of malpractice litigation. The cases which come before us in the malpractice area reflect that generally in such actions every facility and doctor having any connection with the surgery or treatment performed is joined regardless how tenuous its or their culpability may be. Hospitals making organs available do so for moral and

humanitarian reasons. We know of no legal requirement they do so and we know of no reason why they could not simply refuse to make transplantable organs available or limit the forums to which they will make them available. Negligence does occur in hospitals and erroneous blood typing occurs in even the best of hospitals. See Barnes Hospital v. Missouri Commission on Human Rights, 661 S.W.2d 534 (Mo. banc 1983). Hospital employees, as human beings, make mistakes, and the administrators of hospitals surely are aware of this. If the threat of having to defend a potential malpractice action, meritorious or otherwise, in a far distant jurisdiction serves to cause even one hospital to refuse to provide an organ necessary to keep a Missouri resident alive the results far outweigh the inconvenience of requiring Missouri residents to sue in the hospital's home forum. Missouri has restricted the availability of some tort concepts in some humanitarian medical treatment situations where human life is at stake. Sec. 537.037 RSMo 1986. We do not believe it in keeping with that public policy to place the convenience of Missouri residents in litigating above the interest of the public in having transplantable organs available. Respondent's argument that being subject to suit here may make hospitals more careful, is premised on the supposition that only negligent hospitals are subjected to malpractice suits in foreign jurisdictions. It overlooks the fact that when organs are supplied for humanitarian reasons the potential of responding to foreign jurisdiction lawsuits may serve to terminate or reduce that supply to those jurisdictions. We are unable to conclude that imposition of personal jurisdiction over relator in Missouri would comport with "fair play and substantial justice." (Slip opinion, pp. 12 & 13)

The fundamental policy reasons that are so important in this case could hardly be stated any more eloquently.

Petitioner is wrong on the facts, wrong on the law, and wrong on the fundamental policy considerations to be considered by any court. Further, aside from quoting generalities from different decisions, no case which is even remotely close to the fact situation at hand has been cited by petitioner. This is all the more surprising in view of this Court's ruling in the *Sperandio* case, cited supra, which would appear to be square authority for the Missouri court's ruling on the jurisdictional issue here involved.

CONCLUSION

The Missouri court applied the rules as set forth by this Court. Had the Missouri court decided the issue differently, that is, in favor of jurisdiction, a strong case would have been made for the granting of certiorari by this Court. As it is, petitioner has failed to show any facts supporting his position, and has failed to cite even one case which is even remotely applicable in the face of one decision of this Court which appears to be squarely in point. The guidelines set down by Rule 17 of this Court simply have not been established in the petition. Even more importantly, however, the Missouri court's opinion is correct and in accordance with the decisions of this Court. consequently, petitioner's application for certiorari should be denied in all respects.

Respectfully submitted,

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Counsel of Record/
Counsel for Respondent

APPENDIX

APPENDIX A

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

Cause No. 862-02807 Div. #1

Rose Ottinger,
Plaintiff

vs.

Wichita Falls General Hospital, et al.,
Defendants

AFFIDAVIT

Before me personally appeared Lloyd L. Cannedy, Ph.D. and upon oath states the following:

1. My name is Lloyd L. Cannedy. I am a Vice-President and Assistant Administrator for the defendant, Wichita Falls General Hospital, which is actually named Wichita General Hospital and is located in Wichita County, Wichita Falls, Texas. I have personal knowledge of the facts herein set forth.

2. Defendant is a hospital incorporated under the laws of the State of Texas. Defendant's principal place of business is in Wichita Falls, Texas. Defendant is an entity operating assets leased from Wichita County, City of Wichita Falls, Texas hospital board, a Texas political subdivision. Defendant solicits no patients by mail. Defendant does no business and has no agents in Missouri. Defendant's business is confined to providing health care services to its patients. It is not part of defendant's business to solicit donor organs for distribution.

3. The Southwest Organ Bank is a not-for-profit corporation, headquartered in Dallas, Texas. When donor organs become available, defendant advises the Southwest Organ Bank of the

availability of donor organs. When the Southwest Organ Bank has been notified by defendant of the availability of donor organs, the Southwest Organ Bank notifies interested parties. Defendant receives no financial gain from making donor organs available. The making of donor organs available by defendant is a humanitarian, not-for-profit activity. Defendant has no control over where the donor organs are sent.

4. On March 20, 1986, defendant advised Southwest Organ Bank of the availability of the subject donor organ. A donor transplant team from St. Louis, Missouri came to Wichita Falls, Texas to harvest the subject donor organ. After the team from St. Louis, Missouri harvested the subject donor organ, they transported it from defendant to St. Louis, Missouri. None of defendant's employees or agents accompanied the subject donor organ from Texas to Missouri. At no time did defendant solicit requests from plaintiff, plaintiff's decedent, plaintiff's decedent's hospital, or from anyone in Missouri for donation of the subject organ.

/s/ Lloyd L. Cannedy, Ph.D
Vice President & Administrator
Wichita General Hospital

STATE OF TEXAS)
)
COUNTY OF WICHITA)

Before me, the undersigned notary public personally appeared Lloyd L. Cannedy, Ph.D., Vice President and Assistant Administrator of Wichita General Hospital, who, having been by me first duly sworn, on his oath stated that the above and foregoing statements and every part thereof are true and correct.

Subscribed and sworn to before me this 18th day of September, 1986.

/s/ Levita West
Notary Public

My commission expires: 10-9-89

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 52539

State of Missouri, ex rel., Wichita Falls General Hospital,
Relator

vs.

The Honorable George A. Adolf, Judge of the Circuit Court of St. Louis City, Missouri,
Respondent

AFFIDAVIT

BEFORE me personally appears Clay Ellis and upon oath states as follows:

1. My name is Clay Ellis and I am Administrator and Chief Executive Officer of the Wichita General Hospital.

2. I am familiar with the billings practices of Wichita General Hospital and with the actual costs incurred by it for providing medical services to patients.

3. I am familiar with the agreement between the Southwest Organ Bank and Wichita General Hospital regarding the donor organ program (hereinafter "the agreement").

4. Under the terms of the agreement, the Southwest Organ Bank reimburses Wichita General Hospital for only a portion of the actual cost incurred by Wichita General Hospital for evaluating and maintaining the donor body.

5. The amounts which are reimbursable under the agreement are less than the actual costs incurred by Wichita General Hospital, making it a financial loss for Wichita General Hospital to make a body available for organ donation, and to be involved in the organ donor program.

6. I have reviewed the records of the person from whom the subject organ was taken and have determined that, as a result of making the body available for donating organs, Wichita General Hospital sustained a financial loss.

Further Affiant sayeth not.

/s/ Clay Ellis

STATE OF TEXAS)

COUNTY OF WICHITA)

Before me, the undersigned Notary Public personally appeared Clay Ellis, who, having been by me first duly sworn, on his oath stated that the above and foregoing statement and every part thereof are true and correct.

Signed this 7th day of January, 1987.

/s/ Karen P. Lawson
Notary Public in and for
State of Texas

My Commission Expires: December 29, 1990